

Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of E.H. and the School)
City of East Chicago) **Article 7 Hearing No. 1051-98**

This hearing was initiated by the guardian's request for hearing, which was received by the Division of Special Education, Indiana Department of Education, on June 4, 1998. The original hearing request included two other students who are siblings of the Student. These hearing requests were subsequently withdrawn. Numerous extensions of time were requested and granted by the Independent Hearing Officer (IHO). Prehearing conferences were held on July 2, 1998 and July 13, 1998, in order to formulate the issues and to schedule the hearing. The hearing was held over the course of six (6) days: December 1, 1998; February 2, 1999; February 16, 1999; February 22, 1999; March 8, 1999; and April 14, 1999. Proposed exhibits and witness lists were exchanged between the parties on or before November 25, 1998, pursuant to the IHO's order. Supplemental submissions were permitted for the additional hearing dates.

The following issue was identified at the July 13, 1998, prehearing conference:

Whether the public agency had failed to provide the student with speech/language and occupational/physical therapy services as proposed by the Case Conference Committee.

The Division of Special Education received a complaint from the guardian on March 23, 1999. Because the hearing was still pending, the division referred the complaint issues to the IHO for his determination as to whether the issues were related to the hearing issue and whether he would assume jurisdiction of either or both of the issues. The IHO did subsume these issues which concerned the adequacy of progress reporting for speech/language and occupational/physical therapy, and an alleged breach of confidentiality of student records. During the course of the hearing, the School also requested the hearing officer address the provision of these therapy services for the 1999-2000 school year.

Pursuant to the IHO's order, the final decision in this matter was to have been rendered by April 30, 1999. In June, 1999, the guardian's attorney contacted the due process coordinator, as the decision had not yet been received. The due process coordinator notified the IHO that if a decision was not issued by June 9, 1999, a new IHO would be appointed. The guardian's attorney then filed objections to what she perceived as the granting of an *ex parte* extension of time for filing the decision. On June 9, 1999, the School's attorney sent a letter to the IHO requesting an extension of time. The IHO did

not rule upon this request. The IHO's decision was finally rendered on June 16, 1999.

The IHO's Written Decision

The IHO's written decision contained ten (10) Findings of Fact. The Student is a fourteen-year-old male residing with his legal guardian and attending junior high school. The Student's cognitive abilities and adaptive functioning levels are at least three (3) standard deviations below the mean of standardized examinations measuring cognitive and adaptive skills. For special education eligibility purposes, the Student is classified as moderately mentally handicapped.

The Student has a severe communication disorder of suspected organic origin and nonmaturational in nature. Both his articulation and language skills are delayed. There was evidence of improvement during the 1997-1998 school year.

The School has provided student progress reports to the guardian during the prescribed grading periods. There has been a disparity between the guardian's expectations and the School's format for reporting grades. The guardian has been diligent in attempting to supplement reports of the Student's progress, particularly in the area of speech/language therapy, by visiting and observing the Student's activities at school. The benefit derived from these visits could have been enhanced had they been pre-scheduled in accordance with the grading periods.

The Student is scheduled to advance to the special education program at the high school for the 1999-2000 school year. The School proposed cessation of speech/language therapy, believing the Student would no longer benefit from these services due to limitations imposed by his cognitive skill level. The Student has not been evaluated to determine whether an augmentative communication system, such as a computer or other electronic device, might effectively enable him to benefit from continuing speech/language therapy. The Student has access to computer games suggesting he may have both an interest in and aptitude for use of task-oriented electronic devices or some other system. An assistive technology evaluation to determine whether an augmentative communication system is a manageable and effective means to provide speech/language therapy at the high school level would be appropriate.

The Student's overall muscle tone is below average. There is evidence of deficiencies in fine motor development and visual perception. A consult model developed and monitored by an occupational therapist providing monthly participation with the Student and his teachers (including physical education) can be incorporated into the Student's individual education program (IEP).

There has been no breach of confidentiality of student records by the School. The complained-of incident was an isolated occurrence due to clerical error and not the result of procedural defects in the school's handling of confidential records.

Based upon the Findings of Fact, the IHO made the following Conclusions of Law:

1. The parties and subject matter of this proceeding is [sic] properly before an independent hearing officer. 511 IAC 7-15-5.

2. Further reference - I.C. 4-21.5-3, *et seq.*; 511 IAC 7-11-8(d); 511 IAC 7-10-3(o); 511 IAC 7-11-2(c); 511 IAC 7-11-2(a)(5); 511 IAC 7-6-5(d) and (g); and 511 IAC 7-13-5(i)(j)(4).
3. The Findings of Fact hereinabove set forth are deemed Conclusions of Law and are, therefore, incorporated as such.

From these Findings of Fact and Conclusions of Law, the IHO entered the following Orders:

1. An assistive technology evaluation shall be conducted by the public agency to determine whether an augmentative communication system is a manageable and effective means to provide the Student speech/language therapy at the high school. Specific attention shall be devoted to the feasibility of the use of computers or other electronic devices as an instructional tool designed to develop articulation skills and language.
2. Whether by technological means or a more traditional approach (if the aforementioned is unfeasible), the public agency shall provide the Student speech/language therapy not less than one (1) hour (or its equivalent) per week.
3. The public agency shall provide a physical/occupational therapist consult at the Student's high school of not less than one-half (1/2) hour per month. This service shall be provided by a certified therapist in cooperation with the teacher of record and physical education instructors.
4. The guardian shall be given the opportunity to participate in a parent-teacher conference with the teacher of record at the conclusion of each grading period to report the Student's progress in attainment of goals in all areas of the curriculum. In the event the guardian does not attend the pre-scheduled conference, progress reports shall be dispatched through the usual channels.
5. These orders shall be incorporated into the Student's IEP for the 1999-00 school year and remain in effect until the annual case review, at which time the Student's IEP shall be reviewed and revised as may be appropriate. The assessments and evaluations ordered herein shall be commenced forthwith.

Procedural History of the Appeal

The guardian's petition for review, styled as Appeal and Motion for More Definite Statement and Attorneys Fees, was received by the Board of Special Education Appeals (BSEA) on July 16, 1999. On July 23, 1999, the School, by counsel, requested an extension of time to file its response. This request was granted by the BSEA on July 27, 1999. The School's response was therefore due by August 16, 1999, with the BSEA's written decision to be issued by September 6, 1999. The School's response to the petition for review was timely filed by facsimile transmission on August 16, 1999.

The Guardian's Petition for Review

Petitioner raises several issues in her request for review. She claims she did not withdraw her requests for hearing concerning the other two students, but merely withheld those claims until the current matter was properly discharged. She also wishes to clarify that she did not withhold her consent to the proposed IEP for the 1998-1999 school year, but instead did not participate in the meetings since the school had filed charges alleging she did not meet residency requirements. Petitioner further complains of the IHO's late rendering of the decision and alleges the due process coordinator improperly extended the period within which the decision was to be rendered. The Petitioner objects to the IHO's decision in that it fails to contain any findings of fact as to whether the School provided the services for which the Petitioner requested the hearing. Petitioner objects to the IHO's ruling that the failure to provide progress reports was not a breach of confidentiality. Petitioner objects to the IHO's failure to order the School to provide progress reports from January, 1997, through June, 1999. Petitioner claims the IHO's silence as to whether the School met its burden of proof must be viewed in the light most favorable to Petitioner. Finally, Petitioner claims that it must be presumed Petitioner is the prevailing party and entitled to attorney fees.

School's Response to Guardian's Petition for Review

In its response, the School states the Petitioner did withdraw the hearing request for the other two students, and the IHO properly found Petitioner had withheld her consent to the proposed IEP for the 1998-1999 school year. The School points out there was exhaustive testimony that the School had provided the services for which Petitioner sought the hearing, and the fact the IHO made no remedial conclusions or orders indicates the IHO found no errors with the School's provision of related services. The School maintains the IHO properly concluded that the School's failure to provide the correct progress reports was an isolated clerical error. Further, the IHO properly found that progress reports had been tendered to the Guardian. The School also claims any procedural errors by the IHO were *de minimus* and did not have any detrimental effect on educational services provided to the Student. Finally, the School points out that the BSEA does not have jurisdiction over requests for reimbursement for attorney fees.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on August 27, 1999, to conduct its review of the above-referenced matter without oral argument. All members were present and had reviewed the record, the petition for review, response and other pleadings and complaints. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. The Student is a fourteen-year-old male who has been identified as eligible for special education services in the areas of moderate mental impairment and communication disorder.

3. During the course of the hearing and at the request of the School, an additional issue was added concerning the appropriate levels of speech/language therapy, physical therapy, and occupational therapy to be provided during the 1999-2000 school year.
4. Although services were not always provided on the day or at the time specified on the schedule, the Student did receive speech/language therapy and occupational and physical therapies as indicated in his individualized education program (IEP).
5. Neither the Student's last agreed-upon IEP nor the proposed IEP include a statement of how the Student's Guardian will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of the Student's progress toward his annual goals and the extent to which that progress is sufficient to enable the Student to achieve the goals by the end of the year.
6. There was no evidence the School provided the progress reports required by 20 USC §1414(d)(1)(A)(viii).
7. While the Guardian did receive confidential information concerning other students, there was no evidence the School violated this Student's privacy rights. The inadvertent release of information concerning other students was due to clerical error. Appropriate steps have been taken by the School to prevent such errors in the future.
8. The Guardian, by counsel, did withdraw her request for a hearing for her other two wards.
9. The due process coordinator did not grant the IHO an extension of time in which to render his decision. The action of the due process coordinator was taken in response to the complaint of the untimeliness of the decision from the Guardian's counsel, and was an attempt to have the decision rendered as soon as possible. If the IHO was unable or unwilling to render a decision, the due process coordinator would have had to reassign the case to a new IHO.
10. The BSEA has no jurisdiction to determine matters pertaining to the award of attorney fees.

All votes by the BSEA regarding the above were voice votes and were unanimous.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. The IHO's Finding of Fact # 5 is modified as follows:

There is no evidence the public agency has provided student progress reports to the Guardian during the prescribed grading periods. The guardian has been diligent in attempting to monitor the Student's progress, particularly in the area of speech/language therapy, by visiting and observing the Student's activities at school. The benefit derived from these visits could have

been enhanced had they been pre-scheduled in accordance with the grading periods.

2. The IHO's Finding of Fact # 8 is more appropriately a Conclusion of Law and is hereby designated as Conclusion of Law # 3.

3. Finding of Fact # 9¹ is modified as follows:

While the Student is ambulatory and would have no difficulty situating in the classroom or moving about at the high school, his overall muscle tone is below average. Further, there is evidence of deficiencies in fine motor development (paper positioning, etc.) and visual perception.

4. The second part of the IHO's Finding of Fact # 9 is more appropriate as a Conclusion of Law, and is hereby designated as Conclusion of Law # 4:

A consult model developed and monitored by an occupational therapist providing monthly participation with the Student and his teachers (including physical education) can be incorporated into the Student's IEP for the 1999-2000 school year.

5. Finding of Fact # 10 is modified as follows:

Other students' records were sent to the Guardian due to clerical error. The School has taken steps to remedy such errors in the future.

6. Conclusion of Law # 5 is added as follows:

There has been a breach of confidentiality of student records by the public agency due to clerical errors and not the result of procedural defects in the public agency's handling of confidential records. It did not affect confidentiality for this Student.

7. The IHO's Conclusion of Law #2 is deleted and replaced with the following:

Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such. Any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

8. A new Finding of Fact is added and designated as Finding of Fact # 5. The other Findings of Fact are renumbered accordingly.

Testimony and evidence were presented that the speech/language and occupational/physical therapy services were provided, but the records of such services are scanty and not well documented.

¹Finding of Fact # 9, as written, contains both a Finding of Fact and a Conclusion of Law. The BSEA has divided the IHO's finding accordingly.

9. Conclusion of Law # 6 is added as follows:

The School has not provided periodic progress reports as required by the Individuals with Disabilities Education Act (IDEA). 20 USC§1414(d)(1)(A)(viii).

10. The IHO's Order # 4 is amended as follows:

The Guardian shall be given the opportunity to participate in a parent-teacher conference with the teacher of record at the conclusion of each grading period to report the Student's progress in attainment of goals in all areas of the curriculum. The IEP shall state that progress reports shall be provided to the Guardian and the manner in which they will be provided, in accordance with IDEA. 20 USC§1414(d)(1)(A)(viii).

11. All other Motions not specifically addressed herein are hereby deemed denied.

Date: August 31, 1999

/s/ Cynthia Dewes
Cynthia Dewes, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).